Nortel Networks (Asia) Ltd (formerly known as Northern Telecom (Asia) Ltd) & Ors v Sapura Holdings Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2292 OF 2009
KN SEGARA, ALIZATUL KHAIR AND AZIAH ALI JJCA
7 SEPTEMBER 2012

Companies and Corporations — Incorporation of companies — Written agreement — Annual or biennial review of agreement — Agreement not renewed — Whether collateral agreement constituting representations and past conduct binding upon parties — Breach of fiduciary duties — Nature and terms of relationship between parties

Damages — Measure of damages — Assessment — Unlawful and wrongful termination of agreement — Failure to renew contract — Whether damages proven

The first plaintiff held a company which owned a group of companies including the second plaintiff. On the other hand, the third defendant was a manufacturer of Private Automatic Branch Exchange ('PABX system') where the second defendant acted as its international trading arm. The third defendant incorporated the first defendant to market the second defendant's products in Asia. Prior to the year, one Electroscon Sdn Bhd ('Electroscon') was appointed by the third defendant to distribute the PABX system manufactured and supplied by the defendants in Malaysia. It was contended by the plaintiffs that in or about the year 1979 one Ben Beneteau ('Beneteau'), then the second defendant's chief executive and principal officer who also acted on behalf of the third defendant, requested the plaintiffs to undertake the future sales and servicing of the third defendant's PABX equipment in Malaysia. In 1984, the second defendant introduced a written agreement ('distributorship agreement') which was to be reviewed either on an annual or biennial basis. The defendants then officially informed the plaintiffs that their agreement with the defendants would not be renewed and gave the plaintiffs 90 days' notice. It was the plaintiffs' case that a collateral agreement constituting the representations and the past conduct came into effect and was binding upon the plaintiffs and the defendants. The failure to renew the agreement was nothing more than terminating the defendants' contract with the plaintiffs and the non renewal amounted to ipso facto termination. The defendants were estopped both in law and in fact from terminating the agreement and that the termination was not only unreasonable and unfair but also unlawful and wrongful and in breach of the collateral and other agreements. It was also brought forth that the defendants were in breach of the fiduciary and other

duties as co-venturer. In the present appeal, the plaintiffs claimed against the appellants for damages for unlawful and wrongful termination of agreement and a declaration that the defendants had wrongfully, unlawfully, unjustly and unconscionably failed to renew the respondents' contract with the appellants. The issues that arose before the court were regarding the nature and terms of the relationship between the plaintiffs and the defendants; and whether the plaintiffs had proved the damages claimed.

Held, allowing the appeal with costs:

(1) The learned judicial commissioner had not sufficiently appreciated the provisions of s 92 of the Evidence Act 1950 ('Act') and the contemporaneous documentary evidence. The alleged oral representations were directly inconsistent with the provisions of the distributorship agreements. Based on s 92 of the Act, it was not permissible to admit the oral evidence of PW1 which contradicted the written agreements. The alleged oral representations, even if made, were superseded five years later by the written distributorship agreement (see para 14).

(2) The relationship of the parties was nothing more than one arising from a commercial transaction and in view of the entire agreement clause found in the agreements, the parties' rights and obligations must be determined as set out in the said agreements and not on any purported oral representations (see para 14).

(3) The steps implemented by the plaintiffs in 1992 were merely in compliance with their contractual obligations. The learned judicial commissioner had seriously erred in finding that there was a joint venture without having regard to the plaintiffs' obligations as provided under the distributorship agreement. The defendants' relationship with the plaintiffs was nothing more than a commercial transaction and not a joint venture (see paras 15 & 16).

(4) The defendants had sufficient cause and were entitled to exercise their option not to renew the distributorship agreement which had come to an end. There was no unlawful termination of the agreement. In view of the non-exclusive clause in the agreements, the defendants were clearly entitled to exercise their option as to whom any further distributorship agreement should be granted (see para 19).

[Bahasa Malaysia summary

Plaintif-plaintif memegang sebuah syarikat yang memiliki sekumpulan syarikat termasuk plaintif kedua. Sebaliknya, defendan ketiga merupakan pengeluar Private Automatic Branch Exchange ('sistem PABX') yang mana defendan kedua bertanggungjawab bagi perdagangan antarabangsa. Defendan ketiga telah memperbadankan defendan pertama untuk memasarkan produk

defendan kedua di Asia. Sebelum tahun 1979, Electroscon Sdn Bhd ('Electroscon') telah dilantik oleh defendan ketiga untuk mengedarkan sistem PABX yang dikeluarkan dan dibekalkan oleh defendan-defendan di Malaysia. Dihujahkan oleh plaintif-plaintif bahawa dalam atau kira-kira tahun 1979, seorang Ben Beneteau ('Beneteau'), ketua eksekutif defendan kedua dan pegawai utama yang juga mewakili defendan ketiga ketika itu, meminta plaintif-plaintif mengambil alih jualan dan servis peralatan PABX defendan ketiga di Malaysia pada masa akan datang. Pada tahun 1984, defendan kedua memperkenalkan perjanjian bertulis ('perjanjian pengedaran') yang perlu dilihat semula sama ada secara tahunan atau dwi-tahunan. Defendan-defendan kemudiannya memaklumkan kepada plaintif-plaintif secara rasmi bahawa perjanjian mereka dengan defendan-defendan tidak akan diperbaharui dan memberikan plaintif-plaintif notis 90 hari. Adalah menjadi kes plaintif-plaintif bahawa perjanjian kolateral membentuk representasi-representasi dan kelakuan lalu telah berkuat kuasa dan mengikat plaintif-plaintif dan defendan-defendan. Kegagalan untuk memperbaharui perjanjian tersebut seperti tidak lebih daripada menamatkan kontrak defendan-defendan dengan plaintif-plaintif dan ketidakpembaharuan tersebut tidak terjumlah kepada penamatan ipso facto. Defendan-defendan diestop di bawah undang-undang dan fakta daripada menamatkan perjanjian tersebut dan penamatan tersebut bukan sahaja tidak munasabah dan tidak adil tetapi juga menyalahi undang-undang, salah dan merupakan pelanggaran kolateral dan perjanjian-perjanjian lain. Turut diajukan bahawa defendan-defendan telah melanggar tugas fidusiari dan lain-lain sebagai pengusaha bersama. Dalam rayuan ini, plaintif-plaintif menuntut ganti rugi bagi penamatan perjanjian yang salah dan menyalahi undang-undang tersebut dan suatu deklarasi bahawa defendan-defendan telah secara salah, menyalahi undang-undang, tidak adil dan zalim gagal untuk memperbaharui kontrak mereka dengan plaintif. Isu-isu yang timbul di hadapan mahkamah adalah mengenai sifat dan terma-terma hubungan antara plaintif-plaintif dan defendan-defendan, dan sama ada plaintif-plaintif telah membuktikan ganti rugi yang dituntut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Pesuruhjaya kehakiman telah tidak mempertimbangkan peruntukan s 92 Akta Keterangan 1950 ('Akta') secukupnya dan keterangan dokumentar semasa. Representasi lisan secara langsungnya, tidak selaras dengan peruntukan perjanjian pengedaran. Berdasarkan s 92 Akta, adalah tidak dibenarkan untuk menerima keterangan lisan PW1 yang bercanggah dengan perjanjian bertulis. Representasi lisan tersebut, jika pun telah dibuat, telah digantikan lima tahun kemudian oleh perjanjian pengedaran yang bertulis (lihat perenggan 14).

(2) Hubungan pihak-pihak adalah tidak lebih daripada satu yang timbul daripada urus niaga komersial dan melihat kepada keseluruhan fasal perjanjian yang terdapat dalam perjanjian, hak dan kewajipan

pihak-pihak mesti ditentukan seperti yang dinyatakan dalam perjanjian tersebut dan bukan pada apa-apa representasi lisan yang didakwa (lihat perenggan 14).

(3) Langkah-langkah yang diambil oleh plaintif-plaintif pada tahun 1992 adalah semata-mata suatu pematuhan obligasi kontrak mereka. Pesuruhjaya kehakiman telah terkhilaf dalam memutuskan bahawa terdapat usahasama tanpa mengambil kira obligasi plaintif-plaintif seperti yang diperuntukkan di bawah perjanjian pengedaran. Hubungan defendan-defendan dengan plaintif-plaintif tidak lebih daripada suatu transaksi komersial dan bukan suatu usahasama (lihat perenggan 15 & 16).

(4) Defendan mempunyai sebab yang mencukupi dan berhak untuk melaksanakan pilihan mereka untuk tidak membaharui perjanjian pengedaran yang telah tamat. Tidak terdapat penamatan yang menyalahi undang-undang ke atas perjanjian tersebut. Melihat kepada fasal tidak eksklusif dalam perjanjian-perjanjian, defendan jelas berhak untuk melaksanakan pilihan mereka berkenaan kepada siapa sebarang perjanjian pengedaran lanjut perlu diberikan (lihat perenggan 19).]

Notes

For a case on assessment, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) para 303.

Cases referred to

Koh Siak Poo v Perkayuan OKS Sdn Bhd [1989] 3 MLJ 224; [1989] 2 CLJ 1 (Rep); [1989] 1 CLJ 30, HC (refd)

Muniandy & Ors v Public Prosecutor [1966] 1 MLJ 257; [1966] 1 LNS 110, FC (refd)

Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157; [2008] 4 CLJ 217, CA (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229; [1979] 1 LNS 119, FC (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92, 92(b)

Robert Lazar (K Shanti Mogan and Sheila Lingam with him) (Shearn Delamore & Co) for the appellants.

Shahul Hameed Amirudin (Norliza bt Rasool Khan with him) (Zul Rafique & Partners) for the respondents.

Aziah Ali JCA (delivering judgment of the court):

[1] This is an appeal by the appellants (defendants in the court below)

against the decision of the learned judicial commissioner (as Her Ladyship then was) allowing the respondents' (plaintiffs in the court below) claim against the appellants for damages for unlawful and wrongful termination of agreement and a declaration that the defendants had wrongfully, unlawfully, unjustly and unconscionably failed to renew the respondents' contract with the appellants. We had allowed the appeal and set aside the order of the High Court for the reasons we set out below. Costs of RM100,00 here and below was awarded to the appellants and the deposit was refunded. For the purpose of this judgment the parties will be referred to as they were in the court below.

THE PARTIES

[2] The first plaintiff, a holding company owning a group of companies which included the second plaintiff, specialised in manufacturing, marketing, distributing, exporting, installing and servicing of telecommunications equipment. The third defendant was a manufacturer of private automatic branch exchange, commonly known as 'PABX system'. The second defendant was the international trading arm of the third defendant. The third defendant incorporated the first defendant to market the products of the second defendant in Asia.

THE PLAINTIFFS' CASE

[3] Prior to 1979 the third defendant had appointed one Electroscon Sdn Bhd (Electroscon) to distribute in Malaysia the PABX system manufactured and supplied by the defendants. The plaintiffs alleged that in or about 1979 one Ben Beneteau (Beneteau), the then chief executive and principal officer of the second defendant and acting on behalf of the third defendant, approached the executive chairman of the first plaintiff (PW1) to request that the plaintiffs undertake the future sales and servicing of the third defendant's PABX equipment in Malaysia. It was alleged that various representations were made by Beneteau in the negotiations. In para 5.3 of the statement of claim the plaintiffs averred that, Beneteau made the following representations:

(a) the third defendant's choice of the first plaintiff was based on the first plaintiff's past and continuing performance in the telecommunication field in Malaysia, and on the in-house resources that were readily available to the first plaintiff;

(b) the initial marketing of the PABX System and the matters attendant thereto including a commitment to service and maintain the system would be slow and in the process, the first plaintiff would suffer losses;

(c) that Malaysia offered tremendous growth potential for the PABX system. The market would eventually prove to be highly profitable and the losses

absorbed by the first plaintiff in the initial years could be reversed and the first plaintiff would be able to reap sizeable and substantial profits;

(d) all the defendants would make available to the plaintiffs all assistance and back-up required in the plaintiffs' endeavour to market the PABX system;

(e) all the defendants would also make available an agency to the plaintiffs in respect of the PABX System and the various other NT products;

(f) the first defendant and the third defendant should enter into a long term commercial relationship in the telecommunication field which would be commercially beneficial to both parties;

(g) that the services of the plaintiffs would be required to market the PABX system on a long term basis with provisions for automatic renewals;

(h) that to instill confidence among the purchasers and to establish a reputation for the PABX system, the plaintiffs should hold spare parts for at least a period of five years of supply; and

(i) the plaintiffs' past record and reputation will also instill confidence amongst the prospective purchasers that the PABX System supplied was a quality product and that the same would be serviced and maintained effectively.

The plaintiffs averred that induced by the alleged representations, the first plaintiff took over all the rights, titles and liabilities and interests of Electroscon.

[4] According to the plaintiffs up till 1984 the commercial relationship between the plaintiffs and the defendants which commenced in 1979 proceeded without any written agreement and was regulated essentially by the representations made by Beneteau, conduct based on commercial efficacy, prudence, reasonableness and fairness. The plaintiffs contended that the resulting relationship between the first plaintiff and the third defendant was not only of a mere principal and agent or a manufacturer and distributor but as co-venturers in the enterprise of marketing, distributing and servicing the PABX system in Malaysia.

[5] The plaintiffs averred that in 1984 the second defendant introduced a written agreement (distributorship agreement) which was to be reviewed either on an annual or biennial basis. According to PW1 the reason advanced by the second defendant was that it was standardising its affairs internationally and that the written agreement would not in any way infringe or contravene or breach the past agreement that prevailed between the first plaintiff and the third defendant. Since 1984 parties had entered into several distributorship agreements.

[6] In April 1994 the defendants officially informed the plaintiffs in a meeting that the plaintiffs' agreement with the defendants would not be renewed. By letter dated 20 April 1994 the defendants gave the plaintiffs 90 days' notice that based on its evaluation of the plaintiffs' performance the defendants had decided not to renew the distributorship agreement for 1994.

[7] It was the plaintiffs' case that a collateral agreement constituting the representations and the past conduct had come into effect and was binding on the plaintiffs and the defendants. The plaintiffs contended that the failure to renew the agreement is nothing more nor less than terminating the defendants' contract with the plaintiffs and the non renewal was tantamount to ipso facto termination. It was contended that the defendants were estopped both in law and in fact from terminating the agreement and that the termination was not only unreasonable and unfair but was also unlawful and wrongful and in breach of the collateral and other agreements. The plaintiffs claimed that the defendants were in breach of the fiduciary and other duties the defendants owed to the plaintiffs as co-venturer and as a result the plaintiffs had suffered and continued to suffer losses and damages.

[8] The plaintiffs claimed against the defendants amongst others special damages in the sum of RM21,439,000.00, general damages, punitive and exemplary damages and a declaration that the defendants had wrongfully, unlawfully, unjustly and unconscionably failed to renew the plaintiffs' contract with the defendants.

THE APPEAL

[9] Before us learned counsel for the appellants/defendants Mr Robert Lazar raised two issues as follows:

(a) what was the nature and terms of the relationship between the plaintiffs and the defendants; and

(b) whether the plaintiffs had proved the damages claimed.

[10] In essence it was submitted that the oral representations, even if made, were superseded by the subsequent written distributorship agreements and the relationship of the parties was governed by the written agreements. The said agreements contemplated fixed durations and the defendants were entitled not to renew the distributorship by reason of the plaintiffs' poor sales and service performance. The plaintiffs on the other hand contended that notwithstanding the distributorship agreements, the total absence of any written agreement during the first five years of the parties' relationship and the assurances given for the written contracts evidenced the existence of a collateral contract between the parties. It was submitted for the plaintiffs that but for the representations

and for the belief that the oral agreement continued to be in effect, the plaintiffs would not have entered into the agreement.

COLLATERAL CONTRACT

[11] Notwithstanding ss 91 and 92 of the Evidence Act 1950 raised by the defendants and despite acknowledging that the oral evidence of PW1 was made almost 30 years after the purported representations were made, the learned judicial commissioner accepted the testimony of PW1 and found that the oral representations formed a collateral contract side by side to the distributorship agreement. Her Ladyship made amongst others the following findings:

(a) that PW1 was induced into agreeing to be a distributor for the defendants' products and venture into the business of marketing and distributing telecommunication equipment as a result of the oral representations made by Mr Ben; and

(b) that PW1 believed in what Mr Ben had promised him and held on to that promise.

Her Ladyship gave the following reasons for accepting the evidence of PW1:

> Considering the huge commitment and risk undertaken by PW1 in agreeing to be distributor of the defendants' products and the straight forward answers given by PW1, I had no hesitation to say that PW1 was telling the truth.

[12] Whilst we had no issue with the finding of the learned judicial commissioner regarding the credibility of PW1, we were also of the view that, in assessing his evidence, the learned judicial commissioner ought to heed what Chang Min Tat FJ said in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119 as follows:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness,with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.* Plausibility should never be mistaken for veracity. (Emphasis added.)

In *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257; [1966] 1 LNS 110 the trial judge accepted the evidence of certain witnesses because they had

remained unshaken in cross-examination. Based on that evidence he convicted the appellant. The Federal Court reversed the decision. Ong Hock Thye FJ said:

> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.

[13] Section 91 of the Evidence Act 1950 states that extrinsic evidence is not admissible to vary, add to or contradict the terms of a written agreement. Section 91 provides as follows:

> Evidence of terms of contracts, grants and other dispositions of property reduced to form of document
>
> 91. When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of the property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained

In *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157; [2008] 4 CLJ 217 this court through the judgment of Sulaiman Daud JCA (as he then was) said as follows:

> The doctrine of collateral contractor agreement is recognised in this country by virtue of proviso (b) to s 92 of the Evidence Act 1950 which allowed to be admitted in evidence any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms. Unless the additional evidence sought to be introduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add or subtract from the terms of the agreement (per Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 233; [1979] 1 LNS 119). Such collateral contract must be viewed strictly (see *Heilbut, Symons & Co v Buckleton* [1913] AC 30). No agreement would be safe from being re-written by one party in court of law if parole evidence which do not fall within the proviso of s 92 of the Evidence Act is admitted in evidence (see *Tindok Besar Estate Sdn Bhd*).

Proviso (b) to s 92 states as follows:

> Exclusion of evidence of oral agreement

92. When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that:

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is *not inconsistent with its terms,* may be proved, and in considering whether or not this proviso applies, *the court shall have regard to the degree of formality of the document;* (Emphasis added.)

[14] We find that in coming to her finding that there was a collateral contract, the learned judicial commissioner had not sufficiently appreciated the provisions of s 92 of the Evidence Act 1950 and the contemporaneous documentary evidence. The alleged oral representations were directly inconsistent with the provisions of the distributorship agreements. We were of the view that based on s 92 of the Evidence Act 1950 it was not permissible for the learned judicial commissioner to admit the oral evidence of PW1 which contradicts the written agreements. Further we agreed with learned counsel for the defendants that the agreements being contemporaneous ought to be preferred to the oral evidence of PW1 which was given 30 years after the alleged representations. We were in agreement with learned counsel for the defendants that the alleged oral representations, even if made, were superseded five years later by the written distributorship agreement. We find that the testimony of PW1 under cross-examination that the distributorship agreement was sent to him for his signature after his in-house lawyers had studied and vetted the same as evidence that the plaintiffs had accepted and agreed to be bound by the agreement. On the evidence we find that the relationship of the parties was nothing more than one arising from a commercial transaction and in view of the entire agreement clause found in the agreements the parties' rights and obligations must be determined as set out in the said agreements and not on any purported oral representations.

JOINT VENTURE

[15] The plaintiffs contended that the evidence of PW1 showed that the relationship of the parties was not only that of a mere principal and agent or a manufacturer and distributor but a joint venture relationship with the plaintiffs as co-venturer. The learned judicial commissioner agreed that based on the conduct of the parties in their business and the surrounding circumstances of the case the relationship between the parties was more than a buyer and seller or distributor but was consistent with a joint venture where the plaintiffs controlled the venture, find new markets and maximise sales and the

defendants controlled the products. The learned judicial commissioner referred to the events which were implemented by the plaintiffs in 1992 at the request of the defendants as an example which Her Ladyship said supported the existence of a joint venture between the parties. For the defendants it was submitted that the steps implemented by the plaintiffs were implemented because it was the plaintiffs' contractual obligation to do so as distributor responsible for marketing the defendants' PABX system including the provision of servicing and maintenance services to purchasers.

[16] The obligations of the plaintiffs were set out in the distributorship agreement in particular cl 6. We agreed with learned counsel for the defendants that the steps implemented by the plaintiffs in 1992 were merely in compliance with their contractual obligations. We were of the view that the learned judicial commissioner had seriously erred in finding that there was a joint venture without having regard to the plaintiffs' obligations as provided under the distributorship agreement. We were in agreement with the defendants that their relationship with the plaintiffs was nothing more than a commercial transaction and not a joint venture. When the agreements are clear and unambiguous (as in this case) the court should not introduce or add new terms to the agreements (*Koh Siak Poo v Perkayuan OKS Sdn Bhd* [1989] 3 MLJ 224; [1989] 2 CLJ 1 (Rep); [1989] 1 CLJ 30). In our considered opinion the totality of the evidence was insufficient to show that a joint venture relationship existed between the parties. Thus the defendants owed no fiduciary duty towards the plaintiffs. Consequently the order for assessment of damages cannot be supported both in principle and quantum.

TERMINATION

[17] The defendants had given the plaintiffs 90 days' notice that the distributorship agreement would not be renewed although the agreements required only 60 days' notice to be given. The reason for the non-renewal was because of the plaintiffs' poor performance. The plaintiffs contended that the termination of the distributorship agreement was unlawful. The learned judicial commissioner held that the defendants' conduct in terminating the distributorship agreement without just cause was unlawful and unjust to the plaintiffs.

[18] Learned counsel for the defendants submitted that the learned judicial commissioner erred in finding that there was unlawful termination of the agreement. Counsel contended that there was no termination but rather a non-renewal after the last agreement ended. Counsel submitted that the learned judicial commissioner erred in finding that the plaintiffs had met the sales target set by the defendants. It was submitted that DW2 and DW3 had given exhaustive evidence of the problems faced by the defendants in relation

to the plaintiffs' poor performance. Their evidence were not challenged in cross-examination. The failure to cross-examine amounted to an acceptance of their evidence. It was submitted that by reason of the plaintiffs' poor performance the defendants had every right not to renew the distributorship.

[19] We had perused the testimonies of both DW2 and DW3 and find sufficient evidence adduced on the poor performance of the plaintiffs. DW2 testified that at a meeting held on 6 October 1993 in Singapore with the plaintiffs that he attended the plaintiffs told the defendants that they could make a US$4m target but the defendants' analysis showed that the plaintiffs could only make a US$2.5m target. The defendants asked the plaintiffs to review their structure and to inform the defendants what they were going to do. The defendants made known to the plaintiffs that the defendants were unhappy about the plaintiffs' lack of improvement and lack of forward looking plan to structural change. DW3 testified that the plaintiffs failed to meet the sales target for 1992 and achieved only US$2.88mcompared to the sales target of US$3.66m. In 1993 the plaintiffs' sales performance plunged to US$1.8m when every other distributor in the Asean region equalled if not improved their 1992 performance. On the evidence we were of the view that the defendants had sufficient cause and were entitled to exercise their option not to renew the distributorship agreement which had come to an end by effluxion of time. Hence we were unable to agree with the learned judicial commissioner's finding that there was an unlawful termination of the agreement. Further in view of the non-exclusive clause in the agreements we were of the view that the defendants were clearly entitled to exercise their option as to whom any further distributorship agreement should be granted.

[20] For the reasons adumbrated above we allowed the appeal with costs and set aside the decision of the High Court.

Appeal allowed with costs.

Reported by Ibnu Aswan